Patient Privacy and Confidentiality

At the 1998 HMA House of Delegates meeting, Resolution 7 introduced by E. Blossom Wang MD was passed directing the publication of materials relating to patient privacy and confidentiality. This issue is an agenda item for the 1999 Hawaii State Legislature. Note: Only portions of documents reprinted here, resulting in missing numbered sections.

Resolution 7

RESOLVED, The Hawaii Medical Association follow the recommendation of the AMA Board of Trustees report to read and review the Massachusetts Policy on Patient Privacy and Confidentiality as adopted by the Massachusetts Medical Society House of Delegates November 8, 1996; to have a copy of the Policy In Entirety available for reference and resource when considering formulating HMA policy on medical privacy issues such as but not limited to proposing or reviewing legislation, reviewing insurance contracts, representing the HMA on task forces, etc. and to publish the website address of the full report in the HMA Journal (http://www.massmed.org/physicians/pubs/privacy.html) to print in the HMA Journal a copy of the Statement of Principles from the Massachusetts Medical Society's Policy on Patient Privacy and Confidentiality which forms Appendix A pages 17, 18, 19, 20 and 21 of AMA President Elect Thomas Reardon, MD's AMA Board of Trustees Report 9 A-98 of June 30, 1998 and which is reproduced below:

Appendix A
Policy on Patient Privacy and Confidentiality
as adopted by the Massachusetts Medical Society House of Delegates
November 8, 1996

Statement of Principles

General Principles

1. The patient has a fundamental right to privacy and confidentiality in his/her relationship with a physician. It is the physician's responsibility to do his/her best to protect the patient's privacy and confidentiality.

   Patient-physician relationships should be governed by mutual trust, respect, courtesy, honesty, and confidentiality.

2. Privacy and confidentiality are the privileges of the patient, so only he or she may waive them, in a meaningful and non-coerced fashion.

   Release of information for a specific purpose such as insurance payment should not require waiver of the total right to privacy and confidentiality.

3. An individual's rights to privacy and confidentiality should not be compromised. Statutory and regulatory exceptions should be specific and narrowly defined.

4. Conflicts between a patient's right to privacy and a third party's need to know should be resolved in favor of the patient's privacy and confidentiality except where that may result in serious harm to the patient or others.

5. The development and acceptance of new information technologies should include measures that strengthen, not jeopardize, patient privacy and confidentiality.

6. Physicians have an ethical responsibility to understand issues of privacy and confidentiality, educate their staffs, and make reasonable efforts to inform their patients of these issues.

Principles Pertaining to Confidentiality of Medical Information in Health Insurance

1. Physician participation in an insurance plan must not be contingent upon the physician's agreement to release medical records for various insurance company purposes, without meaningful patient consent.

2. A subscriber's ability to obtain health insurance must not be contingent upon the subscriber's agreement to a broad and indefinite consent for disclosure. A subscriber should not be required to consent to the disclosure of medical information for other adults enrolled in the plan as the subscriber's dependents or family members. The amount of information that an individual must disclose in order to qualify for health insurance benefits and payment must be strictly defined and limited.

3. Every insurer should formally disclose in writing to each individual adult covered by the health plan the insurer's specific policies and procedures for accessing confidential patient information, including the uses for which medical information is sought and the numbers and functions of persons who have access to it. This written information should be supplied at least annually.

4. Insurers should limit the scope of medical information to that which is absolutely necessary to complete the particular function, and should not seek to obtain the whole medical record. Information obtained for one purpose should not be used for other purposes.

5. Only completed disidentified patient information should be used to perform insurance panel credentialing, quality assurance monitoring and routine utilization review.

6. Each time medical information is sought, the insurer should obtain the individual patient's written consent, which must specify:

   a) the precise scope of the information requested, with clinical information limited to what is absolutely necessary to perform the particular function.

   b) the specific purpose for which the information is sought.

c) the name of the recipient(s) of the information. If the recipient is an institution, the functions of the persons who will have access to it should be specified.

   d) whether the information needed is identified or disidentified information. If disidentified information is appropriate it should be done by the physician's office prior to its release.

   e) that the patient has the right to review the information requested prior

to any disclosure, whether the information is identified or disidentified.

f) where and how the information will be stored and when it will be destroyed.

g) the identities of any secondary data processing companies that are receiving their medical information.

h) the consequences of withholding or limiting consent, and specific instructions as to the appeal process.

7. Insurers shall adopt and enforce prohibitions on redisclosure or reuse of medical information for secondary purposes, even within the insurance company or payer itself.

8. Physicians have the right to remove sensitive information before submitting medical information to the insurer, or to provide a summary of the record. This should include any information pertaining to persons other than the patient.

9. Patient specific utilization review and eligibility determinations should be performed by a peer reviewer and only the reviewer (not the payer) should have access to the clinical information necessary for review. This information should have the name of the patient and other obvious identifiers removed for the purposes of review.

10. Any disclosure of information must be traceable for both electronic and paper records.

11. There is an increased threat to privacy and confidentiality when providers and payers merge. Hence, further protections are necessary to prevent access to medical information for administrative purposes.

12. There should be enforced time lines for the destruction of medical information. Medical information should not be warehoused by insurance companies.

Principles Pertaining to Information Technology and Electronics Medical Records

1. Electronic medical records offer an opportunity for dramatic benefits to patients in clinical care, research and the delivery of health care. However, electronic records will not be capable of providing these benefits unless patient privacy and confidentiality are strengthened, not jeopardized, by new policy governing information technologies.

2. Regarding the electronic record, as with the paper record, the patient has the right to privacy and confidentiality of his/her personally identified medical information.

3. Within the clinical setting all those directly involved in the treatment should obtain access to the record through the attending physician according so the consent of the patient.

4. For any individual or organizations with authorized access to the electronic medical record, the level of access permitted should be specifically identified in advance. Full disclosure of this information to the patient is necessary.

5. Patient data should be assigned security protections that should be used to control who has access to the information. In addition, mandatory audit trails to determine who has accessed the electronic record should be maintained and made available to the attending physician, and to the patient upon the patient's request.

6. Physicians should be educated about technologies of security.

7. In systems of electronic medical records, patients, in consultation with their physician, should be able to specify what information should not be disseminated.

8. While offering potential clinical and research benefits, systems designed to encourage data linkage though the mandatory use of unique health identifies or standard code sets may jeopardize patient privacy and should require patient consent.

9. Patient-specific information should not be released to data clearing houses without meaningful notice to and consent of the patient, and assurance of privacy and confidentiality.

10. Other organizations concerned with the development of electronic medical records should be encouraged to pursue research, development and education in matters related to privacy and confidentiality.

11. Firm, explicit state and federal statutes should regulate access to identified confidential electronic patient data and define punitive measures for negligence and deliberate violation of security measures.

Principles Pertaining to Genetic Information

1. All genetic testing must be voluntary and done with fully informed consent.

2. Results of genetic testing should not be disclosed to anyone other than the tested individual, unless the individual gives separate and explicit written consent for each disclosure.

3. Results of any genetic testing and family history data should be segregated in the patient's medical record and protected from inadvertent disclosure.

Principles Pertaining to Public Health

1. As is current practice, public health information should continue to be collected only on a disease or condition-specific basis, and should be protected from redisclosure.

Principles Pertaining to Research

1. Clinical research is essential to the advancement of medicine. Without privacy and confidentiality, patients will not reveal and physicians will not record accurate information necessary for clinical care or research. Therefore, medical information used for research, including public health research, should be disidentified at the source, unless the patient voluntarily and expressly consents to the use of his/her personally identifiable information. An institutional review board that conforms to federal standards may permit the release of limited patient-specific information to the research for clinical research purposes.

2. Whenever personally identifiable medical information is used in research, patient privacy and confidentiality should be protected and the further disclosure of information should be prohibited.

Principles Pertaining to Public Safety

1. In the interest of public safety, law enforcement officials may access medical records by court order specifying: the particular individual, the specific and limited portion of the medical record requested, that good cause was shown that the public's safety necessitates the access, that

there is no other non-confidential source for the information, and that it will be viewed but not retained in the law enforcement file beyond the immediate reason for which it is sought.

Principles Pertaining to Marketing and Commercial Use

1. Patient medical information, whether identified or disidentified, should not be a commodity in the marketplace, and should not be made available for purchase or sale by any individual or entity.

2. Even the most general patient information should not be disclosed to vendors or others for marketing purposes without the patient's written informed consent.

Resolution 7 (continued)

and be it further

RESOLVED, The Hawaii Medical Association, except where superseded by HMA written policy, reaffirm its commitment to abide by: the American Medical Associations Code of Ethics including the Principles of Medical Ethics; the Fundamental Elements of the Patient-Physician Relationship; the Current Opinions of the Council on Ethical and Judicial Affairs and updates as they occur; the current edition and updates as they occur of the Policy Compendium of the AMA which is a source of reliable information on existing AMA Policies, ethical opinions, and bylaws and which is available in the HMA office; and the Reports of the Council on Ethical and Judicial Affairs and the three key principles adopted by the AMA Board of Trustees regarding the confidentiality of medical information, and the above printed statements of the House of Delegates; and be it further

RESOLVED, HMA refer to the above documents and verify consistency between our national AMA policy and our local HMA policy whenever appropriate such as: when making HMA policy on medical privacy and confidentiality, when proposing or reviewing legislation, when sitting on a task force for patient privacy and confidentiality, when reviewing contracts of physicians with insurers, hospitals or other third parties, when asked to intervene or express an opinion re medical privacy and confidentiality etc.; and be it further

RESOLVED, That the HMA publish in the HMA journal the following relevant statements or AMA Opinions and policies noting that those which begin with the letter E come from the Council on Ethical and Judicial Affairs and those which begin with the letter H are from the House of Delegates:

PRINCIPLES OF MEDICAL ETHICS

Preamble:

The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility not only to patients, but also to society, to other health professionals, and to self.

IV. A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law.

Fundamental Elements of the Patient-Physician Relationship

From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. The patient-physician relationship is of greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion, provide information about their medical condition to the best of their ability, and work with their physicians in a mutually respectful alliance. Physicians can best contribute to this alliance by serving as their patients' advocate and by fostering these rights:

4. The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest.

In response to intensified federal legislative efforts, and building on previously enunciated ethical principles, the AMA Board of Trustees adopted the following key principles by which to evaluate any proposal regarding the confidentiality of medical information:

1) That there exists a basic right of patients to privacy of their medical information and records, and that this right should be explicitly acknowledged;

2) That patients' privacy should be honored unless waived by the patient in a meaningful way (i.e., informed, noncoercive) or in rare instances of strongly countervailing public interest; and

3) That information disclosed should be limited to that information, portion of the medical record, or abstract necessary to fulfill the immediate and specific purpose.

The duty of confidentiality constitutes an integral part of professional ethics, and is featured in virtually every oath of medicine, most prominently the Hippocratic Oath: "What I may see or hear in the course of treatment...which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about." This pledge is embodied in the Principles of Medical Ethics, the Fundamental elements of Patient-Physician Relationship, and Opinion 5.05, "Confidentiality," in the AMA Code of Medical Ethics. Confidentiality is critical in health care because it is a vital prerequisite for trust and honesty in the patient-physician relationship; it allows patients to seek medical care and disclose sensitive details openly with their physicians without fear of consequences.

E-1.00 Introduction

E-1.01 Terminology. The term "ethical" is used in opinions of the Council on Ethical and Judicial Affairs to refer to matters involving (1) moral principles or practices and (2) matters of social policy involving issues of morality in the practice of medicine. The term "unethical" is used to refer to professional conduct which fails to conform to these moral standards or policies.

Many of the Council's opinions lay out specific duties and obliga-

tions for physicians. Violation of these principles and opinions represents unethical conduct and may justify disciplinary action such as censure, suspension, or expulsion from medical society membership. Issued prior to April 1977; Updated June 1996.

E-1.02The Relation of Law and Ethics. The following statements are intended to clarify the relationship between law and ethics.

Ethical values and legal principles are usually closely related, but ethical obligations typically exceed legal duties. In some cases, the law mandates unethical conduct. In general, when physicians believe a law is unjust, they should work to change the law. In exceptional circumstances of unjust laws, ethical responsibilities should supersede legal obligations.

The fact that a physician charged with allegedly illegal conduct is acquitted or exonerated in civil or criminal proceedings does not necessarily mean that the physician acted ethically. Issued prior to April 1997; Updated June 1994.

E-5.05Confidentiality. The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities. Also, communicable diseases, gun shot and knife wounds should be reported as required by applicable statues or ordinances. Issued December 1983; Updated June 1994. (IV)

E-5.08Confidentiality: Insurance Company Representative. History, diagnosis, prognosis, and the like acquired during the patient-physician relationship may be disclosed to an insurance company representative only if the patient or a lawful representative has consented to the disclosure. A physician's responsibilities to patients are not limited to the actual practice of medicine. These services might include certification that the patient was under the physician's care and comment on the diagnosis and therapy in the particular case. See also Opinion E-2.135. Issued prior to April 1977. (IV)

H-140.989 Informed Consent and Decision-Making in Health Care:

(4) Conflicts between a patient's right to privacy and a third party's need to know should be resolved in favor of patient privacy, except where that would result in serious health hazard or harm to the patient or others. (5) Holders of health record information should be held responsible for reasonable security measures through their respective licensing laws. Third parties that are granted access to patient health care information should be held responsible for reasonable security measures and should be subject to sanctions when confidentiality is breached.

(6) A patient should have access to the information in his or her health record, except for that information which, in the opinion of the health care professional, would cause harm to the patient or to other people.

H-190.996 Employers' Violation of Patient Privacy with Group Medical Insurance Claim Forms:

The AMA urges employers and health insurance companies to adopt policies and practices that preserve employee confidentiality of medical information, including medical claims information, in the workplace. Further, the AMA is aware that employees' and job applicants' medical information may be inappropriately shared with employers in other, more subtle ways and that such information could provide the basis for employer discrimination. The AMA will continue to monitor such reports, and other sources of relevant information and take appropriate action, as needed. (CMS Rep. K, A-86; Amended by Sunset Report, I-96; Amended: sub. Res. 116, I-97)

H-315.986 Confidentiality of Patient Records: Our AMA opposes the concept that filing a claim for medical insurance coverage constitutes a blanket waiver of a patient's right to confidentiality of his/her medical records for all purposes. The AMA will engage in a major initiative to educate patients about the implications and consequences of blanket medical records releases, and educate patients about the need for possible legislative modifications. (Res. 243, I-94; Appended: Res. 231, I-97)

H-315.987 Limited Access to Medical Records: The AMA will pursue the adoption of federal legislation and regulations that will: limit third party payors' random access to patient records unrelated to required quality assurance activities; limit third party payors' access to medical records to only that portion of the record (or only an abstract of the patient's records) necessary to evaluate for reimbursement purposes; require that requests for information and completion of forms be delineated and case specific; allow a summary of pertinent information relative to any inquiry into a patient's medical record be provided in lieu of a full coy of the records (except in instances of litigation where the records would be discoverable); and provide proper compensation for the time and skill spent by physicians and others in preparing and completing forms or summaries pertaining to patient records. (Sub. Res. 222, I-94)

H-315.990 Confidentiality of Computerized Patient Records: The AMA (1) reaffirms the importance of confidentiality of patient records regardless of the form in which they are stored;

H-315.992 Copying Records for Audits: The AMA supports taking appropriate action to ensure that the financial responsibility for producing or copying patient records at the request of any regulatory agency having the authority to do so shall be borne entirely by the requesting agency and the request for said records shall be made at least 30 days in advance of any deadline. (Res. 75, A-91)

H-320.967 Insurance Company Requests for Patient Information. It is the policy of the AMA to study the issue of insurance company demands for unlimited access to patient records and to recommend guidelines for disclosure of information contained in a patient's medical records to insurance companies; (2) to work with the insurance industry to ensure insurance company acceptance of and compliance with AMA guidelines for release of patient records; (3) to week to ensure that physicians are compensated for their costs of retrieving and providing these records; and (4) that while awaiting the development of more detailed guidelines at some future date, requests made to physicians or hospitals for information must be time- and illness-specific so as to avoid compromising patient confidentiality. (Sub. Res. 106, I-91)

H-320-979 Potential Breaches of Confidentiality Resulting from Third Party Payors' Requests for Patient Information: The AMA (1) supports compiling and disseminating information about the extent of the problems (especially those related to breaches of confidentiality) created by insurance company practices relating to requests for patient information; (2) supports expressing to major health insurance companies its objections to insurance company practices which potentially jeopardize a physician's ethical responsibility to protect patient confidentiality; and (3) encourages state and county medical associations to work with local carriers to solve problems created by insurance company requirements which potentially jeopardize a physician's ethical responsibility to protect patient confidentiality. (Res. 75, I-89)

H-320.981 Relief From Third Party Payors Requiring Confidential Patient Information Over the Telephone: The AMA supports developing and pursuing appropriate solutions, including federal legislation if necessary, to the problems of telephone utilization review practices, their effect on patient confidentiality and their effect on the ability of physicians to practice medicine in a reasonable environment, and supports providing model state legislation for regulation of utilization review activities. (Res. 66, A-89)

H-320.996 Confidentiality: The AMA continues to encourage state legislatures to amend their current privileged communication statutes pertaining to physician-patient relationships so as to assure appropriate protection for communications between patients and all health care providers. (CMS Rep. J, A-80; Reaffirmed: CLRPD Rep. B, I-90)

Resolution 7 continued

and be it finally

RESOLVED, That the HMA provide a copy of this resolution including AMA policies printed above, Massachusetts Medical Association Policy Principles printed above, and the three key principles adopted by the AMA Board of trustees to all of the legislators in the Hawaii legislature, to all legislators from Hawaii in the US House and US Senate, to the Insurance Commissioner of the State of Hawaii; the Chief Executive Officers of companies licensed to provide insurance in the State of Hawaii; to any task force on privacy and confidentiality that HMA sits on, as soon as possible, to the Mayors of all of the Counties of Hawaii, to the Governor and Lieutenant Governor of the State of Hawaii, the President of the United States of America, and to any other persons or entities which the leadership of the HMA deems appropriate to send it to and make available for reference to the above persons and entities the complete policies of the AMA especially the Policy Compendium.

Fiscal Note: Minimal